SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 150162/2011
TOUCHPOS SOLUTIONS, LLC
vs.
TANASE, THOMAS
SEQUENCE NUMBER : 004
STRIKE ANSWER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motions sequence numbers 004, 005 and 006 are consolidated for joint disposition and decided herein.

ORDERED that defendant's motion for summary judgment dismissing plaintiffs' first and second causes of action (seq. 005), is denied; and it is further

ORDERED that plaintiffs' motion to strike the defendant's Answer for failure to comply with discovery demands (seq. 004) is granted to the extent that defendant's Answer is stricken unless defendant complies with this Court's Compliance Conference Order and provides, *in toto*, plaintiffs with the emails previously demanded, within 14 days of the date of entry of this decision; and it is further

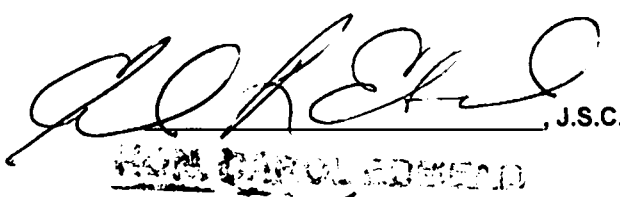
ORDERED that plaintiffs' motion for an extension of time to file the note of issue (seq. 006) is granted, and plaintiffs shall file the note of issue by November 1, 2013; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendant within five days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10.02.2013



, J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

TOUCHPOS SOLUTIONS, LLC, DAVID COOPERMAN and DAMIAN CAMPBELL,

Plaintiffs,

-against-

THOMAS TANASE,

Defendant.

----------X

Index No. 150162/2011

Motion Seq. Nos. 004, 005, and 006

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION[1]

In this action for, *inter alia*, breach of fiduciary duty, defendant moves for summary judgment dismissing plaintiffs' first and second causes of action (seq. 005), and plaintiffs move to strike the defendant's Answer for failure to comply with discovery demands (seq. 004) and to file the note of issue (seq. 006).

Factual Background

Co-plaintiffs David Cooperman ("Cooperman") and Damien Campbell ("Campbell") are two of three members of the plaintiff TouchPOS Solutions LLC (the "LLC" or "TouchPOS"), and defendant Thomas Tanase ("defendant") is the third member of the LLC. TouchPOS is in the business of installing "Point of Sale" ("POS") software solutions for restaurant businesses.

Plaintiffs allege that in May 2011, defendant was sent to a TouchPOS customer, Brother Jimmy's BBQ ("Brother Jimmy's") in St. Maarten in the Carribean to install the POS software. While there, defendant was disrespectful towards and ridiculed Brother Jimmy's principal, Jimmy Goldman ("Goldman") and disagreements ensued between them. Defendant sent inappropriate emails, some from his personal email account, to Goldman and other TouchPOS

[1] Motions sequence numbers 004, 005 and 006 are consolidated for joint disposition and decided herein.

customers, as well as Cooperman questioning Cooperman's competence and impugning Cooperman's reputation and management ability. As a result, plaintiffs seek at least $100,000 for breach of fiduciary duty (first cause of action), and seek to expel defendant from the LLC (second cause of action).[2]

Defendant now moves for summary judgment dismissing plaintiffs' first and second causes of action. Defendant contends that as indicated by an email from Goldman to Cooperman dated April 29, 2011, Cooperman began having problems with Goldman in April 2011, and sent defendant to install the POS software in order to "Sanitize" their "severely damaged" relationship. When defendant arrived, he waited more than four hours for the restaurant to open, and unfortunately, subsequent emails between defendant and Goldman became heated. However, by the time defendant installed the software, there were no problems between them, and Brother Jimmy's remains a client of TouchPOS today. Upon defendant's return, he was advised of the staff's concern with the impact of defendant's emails on the LLC, when in fact, emails show that the staff was concerned with Cooperman's initial problems with Goldman and his management of the LLC. Defendant argues that as indicated by this Court's previous decision denying plaintiffs' application for an order to show cause and temporary injunction, a single incident that occurred two years ago, with a single client, who is still a client of the LLC, and from which plaintiffs have not identified a single item of damages or lost business, is insufficient to support the causes of action. The subject email to Cooperman questioning

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[2] The second cause of action to expel defendant alleges that "expulsion" appears under the definition of "Withdrawal Event" in the parties' Operating Agreement, and is "Predicated upon the allegations set forth in the First Cause of Action," as a "result of the Defendant's acts, which are detrimental to the good name of TouchPOS, which has damaged all Plaintiffs and undermined the existence of the company." (Amended Complaint, ¶33).

Cooperman's competence, is, as this Court held, non-actionable opinion.

In opposition to defendant's motion for summary judgment, plaintiffs contend that they have one email that defendant sent to one of its customers and cannot determine how many other similar emails defendant sent to the other customers or potential customers because defendant refuses to respond to plaintiffs' discovery demands. Defendant's argument that a single act cannot support plaintiffs' breach of fiduciary duty claim is unsupported by the facts and contrary to caselaw, and plaintiffs' separate motion for sanctions should be granted. Plaintiffs also argue that the email on which defendant relies was written by Goldman *after* defendant arrived in St. Maarten and was about defendant's inappropriate behavior, not about the LLC, and Goldman then discussed the consequences of Goldman's relationship with the LLC subsequent to defendant's visit to St. Maarten. Goldman asked the LLC to take defendant off of the St. Maarten project. Mr. Goldman refused to expand his business with the LLC due to defendant's unprofessional behavior. Plaintiffs argue that defendant misstates the Court's holding in denying plaintiffs' application for a preliminary injunction. The record shows that defendant insulted and threatened Goldman, and denigrated Mr. Cooperman's abilities to Goldman. The email shows that Goldman did not want to do any further business with TouchPOS due to defendant's behavior. Because of the various disputed issues of fact and defendant's failure to respond to discovery that is needed to oppose defendant's motion, said motion should be denied.

By separate motion (sequence 004), and as a result of defendant's failure to provide discovery pursuant to this Court's conference order, plaintiffs seek to strike defendant's Answer pursuant to CPLR 3126 (see August 8, 2012 First Request for Production of Documents; March 26, 2013 Compliance Conference Order; and May 17, 2013 Letter from plaintiffs' counsel). The

Court's Compliance Conference Order directed defendant to respond to plaintiffs' discovery demands for emails in defendant's possession relevant to the complaint and counterclaims by April 25, 2013, and for the Note of Issue to be filed by July 3, 2013. Defendants have yet to produce discovery as required, and as such, their Answer should be stricken. Plaintiffs also move (sequence 006) for an extension of time to file the Note of Issue upon the resolution of the discovery issues. Plaintiffs argue that they could not file the Note of Issue due to defendants' failure to complete discovery.

In opposition, defendant argues that the parties were in settlement discussions, which continued until within the last few weeks. Most recently, plaintiffs' counsel telephoned defendant's counsel and reiterated a previous settlement offer and inquired as the production of documents. Defendant's counsel rejected the offer and before he could request additional time to respond to plaintiffs' document demand, counsel for plaintiffs hung up the phone, and filed the instant motion for discovery sanctions. Defendant also points out that his subsequent motion for summary judgment stayed all discovery pursuant to CPLR 3214(b). In the event the Court denies defendant's summary judgment motion or determines that discovery should proceed, defendant can respond to all outstanding discovery within 10 days after notice of entry.

In further support of summary judgment, defendant contends that Brother Jimmy's is required to use a different vendor in the continental United States and that it used TouchPos for the job in St. Maarten, which is outside the continental United States. A single rude letter or interaction with a customer of the company cannot constitute a breach of fiduciary duty or form the basis for expulsion.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d at 927; *Meridian Management Corp. v Cristi Cleaning Serv Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions,

expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Cabrera v Rodriguez*, 72 AD3d 553, 900 NYS2d 29 [1st Dept 2010]; *Casper v Cushman & Wakefield*, 74 AD3d 669, 904 NYS2d 385 [1st Dept 2010]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To prevail on a cause of action for breach of fiduciary duty, plaintiffs must establish that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 A.D.3d 699, 924 N.Y.S.2d 77 [1st Dept. 2011]). "Owners of a fractional interest in a common entity are owed a fiduciary duty by its manager (*Yuko Ito , supra citing Caprer v Nussbaum*, 36 A.D.3d 176, 189, 825 N.Y.S.2d 55 [2006]).

Defendant failed to establish his entitlement to summary judgment as a matter of law. Defendant does not dispute that he owes plaintiffs a fiduciary duty. Further, contrary to defendant's contention, the record fails to establish that he did not breach a fiduciary duty to plaintiffs. While the April 29, 2011 email between the parties and Goldman demonstrate that the LLC's relationship with Goldman was "severely damaged," the same email indicates that Goldman wanted the LLC to "Proceed" and "Sanitize" their relationship, thereby implying the Goldman was giving Cooperman the opportunity to salvage their business relationship. Once Cooperman indicated that defendant needed access to certain areas of Goldman's office, Goldman agreed to grant such access for the installation of the POS software. In any event, in

opposition, plaintiffs submitted an affidavit from Goldman, indicating that the April 29, 2011 email was sent *because* of defendant's behavior when he arrived in St. Maarten. Goldman attests that defendant "behaved as if he were on vacation, drinking and partying with a female friend that he brought with him from New York." Goldman also attests that "On April 29, 2011, late that [Friday] evening I sent an email to David Cooperman complaining about [defendant's] behavior, saying "Relationship and credibility Is severely damaged." According to Goldman, he wrote this statement "specifically about [defendant's] conduct in St. Maartin," and not before he got involved in the St. Maarten project.

First, defendant failed to cite any caselaw to support his contention that a breach of fiduciary duty cause of action lacks merit on the ground that it is supported by only one incident involving one client. Moreover, in the next string of emails between defendant and Goldman, defendant calls Goldman "a fu- - ing lying sack," and states that he has been working "Every moment" for Goldman's "dysfunctional company," and that if Goldman wanted defendant to do any additional work, Goldman would have to "make himself a ghost." And, in opposition to dismissal, Goldman also attests that defendant "frequently badmouthed" Cooperman while in St. Maarten. Such emails sufficiently support plaintiffs' claim that defendant "committed misconduct" and therefore breached his fiduciary duty owed to the plaintiffs. Thus, defendant's reliance on the April 29, 2011 email to show that the LLC's relationship with Goldman was deteriorating prior to defendant's involvement with Goldman is insufficient.

And, defendant's claims that Goldman's company remains a client of the LLC and that Goldman's remaining companies are required to use a different vendor do not warrant dismissal. A "plaintiff asserting cause of action for breach of fiduciary duty 'must establish that the alleged .

. . misconduct w(as) the direct and proximate cause of the losses claimed'" (*RNK Capital LLC v Natsource LLC*, 76 A.D.3d 840, 907 N.Y.S.2d 476 [2010]). Goldman attests that because defendant's behavior was so wildly inappropriate," Goldman was "left with an overwhemingly negative impression of TouchPOS," and have "decided not to use TouchPOS" for point-of-sale systems for the additional restaurants he opened. Thus, an issue of fact exists as to whether defendant's alleged breach was the proximate cause of plaintiff's damages.

Having failed to establish that he did not breach his fiduciary duty to the plaintiffs and that such breach was not a proximate cause of the damages claimed, defendant's motion to dismiss the first cause of action in the amended complaint is denied. And, to the degree the second cause of action to expel defendant is "Predicated upon the allegations set forth in the First Cause of Action," dismissal of the second cause of action is unwarranted.

As to plaintiffs' application for sanctions against defendant for failing to comply with discovery demands and orders, and in light of uncontested fact that defendant failed to provide the emails sought by plaintiff, the Court grants plaintiffs' application to extent that defendants' answer is stricken unless defendant provides, *in toto,* the court-ordered discovery within 14 days of the date of entry of this decision.

Further, plaintiffs' application for an extension of time to file the note of issue is granted as unopposed. Plaintiff shall file the note of issue by November 1, 2013.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing plaintiffs' first and second causes of action (seq. 005), is denied; and it is further

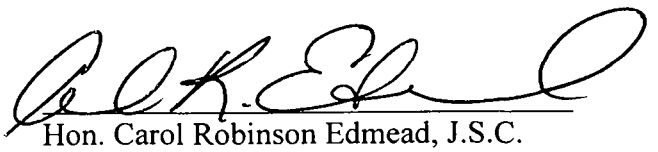
ORDERED that plaintiffs' motion to strike the defendant's Answer for failure to comply with discovery demands (seq. 004) is granted to the extent that defendant's Answer is stricken unless defendant complies with this Court's Compliance Conference Order and provides, *in toto*, plaintiffs with the emails previously demanded, within 14 days of the date of entry of this decision; and it is further

ORDERED that plaintiffs' motion for an extension of time to file the note of issue (seq. 006) is granted, and plaintiffs shall file the note of issue by November 1, 2013; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon defendant within five days of entry.

This constitutes the decision and order of the Court.

Dated: October 2, 2013



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD